

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 5942

DATE COMPLAINT FILED: September 24, 2007

DATE OF NOTIFICATION: October 1, 2007

LAST RESPONSE RECEIVED: November 16, 2007

DATE ACTIVATED: November 29, 2007

EXPIRATION OF SOL: September 14, 2012

COMPLAINANT:

Lane Hudson

RESPONDENTS:

The New York Times Company
Rudy Giuliani Presidential Committee, Inc. and
John H. Gross, in his official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441b(a)
2 U.S.C. § 431(8)(A)(i)
11 C.F.R. § 100.52(d)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves allegations that The New York Times Company ("The Times")
made a corporate contributions in connection with the rate it charged for a full-page
advertisement run by the Rudy Giuliani Presidential Committee ("RGPC" or "the Committee"),
Mr. Giuliani's principal campaign committee for the 2008 Presidential election. The complaint
alleges that The Times made, and RGPC accepted, a prohibited in-kind corporate contribution
when RGPC paid \$64,575 for its full-page advertisement in The Times, far below the appropriate
rate of \$142,083.

1 Based on available information discussed below, including information provided by
2 Respondents, we recommend that the Commission find no reason to believe that Respondents
3 violated the Federal Election Campaign Act of 1971, as amended, ("the Act") and close the file
4 in this matter.

5 **II. FACTUAL AND LEGAL ANALYSIS**

6 **A. Background**

7 On Thursday, September 13, 2007, RGPC contacted The Times, asking to run a full-page
8 advertisement the next day at a price of \$64,575, the same price as another political committee,
9 MoveOn.org Political Action ("MOPA"), reportedly paid for a full-page advertisement published
10 in the Times on September 10, 2007.¹ The Times informed RGPC that it could not guarantee
11 that the advertisement would run the next day. Rudy Giuliani announced this process on a radio
12 show. See <http://hughbewitt.townhall.com/talkradio/transcripts/page 6>. RGPC paid \$64,575 to
13 The Times through its media vendor, and on Friday, September 14, The Times published the
14 RGPC advertisement, headed "'The willing suspension of disbelief.' – Hillary Clinton, 9/11/07."
15 Attachment 1. The advertisement contained a disclaimer, "Paid for by the Rudy Giuliani
16 Presidential Committee, Inc. www.JoinRudy2008.com."

17 Later, on September 23, 2007, The Times published an article by Clark Hoyt, The Times'
18 Public Editor,² in which he stated that MOPA should not have been charged the "standby" rate of

¹ MOPA's advertisement, titled "General Petraeus Or General Betray Us? Cooking the books for the White House," criticized General David Petraeus on the day of his report to Congress regarding the status of the United States military operations in Iraq. Allegations that MOPA did not pay the appropriate Times rate are the subject of MUR 5939.

² Hoyt's article describes The Times' Public Editor as serving "as the readers' representative. His opinions and conclusions are his own."

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1 \$64,575. Clark Hoyt, *Betraying Its Own Best Interests*, THE NEW YORK TIMES, September 23,
2 2007. Attachment 2. Hoyt described this rate as available to advertisers who are not guaranteed
3 what day their advertisement will appear, only that it will be in The Times within seven days.
4 According to Hoyt, because The Times agreed to run MOPA's advertisement on a specific day,
5 Monday, September 10, 2007, The Times should have charged MOPA a higher rate of \$142,083.
6 Hoyt quoted Catherine Mathis, vice president of corporate communications for The Times, as
7 acknowledging "[w]e made a mistake," in that The Times' advertising representative failed to
8 make it clear to MOPA that for the \$64,575 rate, The Times could not guarantee the Monday,
9 September 10 placement; the representative, however, left MOPA with the understanding that the
10 advertisement would in fact run that day. On the same day as the Hoyt article appeared in The
11 Times, MOPA announced that it would pay \$142,083 for its advertisement, and MOPA did so
12 the following day, September 24, 2007.

13 Also on September 24, 2007, the complaint regarding the RGPC advertisement was filed
14 with the Commission. The complaint, citing to the situation regarding MOPA as support, argues
15 that the Times' policy required RGPC to pay the fixed-date rate, and therefore improperly
16 received the "standby" rate for its advertisement because RGPC requested that its advertisement
17 run on a date certain, Friday, September 14, 2007, and the advertisement in fact ran on that date.
18 According to the complaint, RGPC should have paid the same higher rate of \$142,083 that
19 MOPA reportedly paid.

B. Analysis

The Act prohibits corporations such as The Times from making contributions in connection with Federal elections,³ and prohibits political committees such as RGPC from knowingly accepting or receiving such contributions. 2 U.S.C. § 441b(a). The term "contribution" includes giving "anything of value" for the purpose of influencing any election for Federal office. 2 U.S.C. §§ 431(8)(A) and 441b(b)(2). The term "anything of value" includes all in-kind contributions. 11 C.F.R. § 100.52(d)(1).

The provision of goods or services at less than the usual and normal charge for such goods or services is a contribution.⁴ *Id.* The Commission's regulations include "advertising services" as an example of such goods and services. *Id.* If goods or services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged the political committee. *Id.* For the purposes of this provision, "usual and normal charge" for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution. 11 C.F.R. § 100.52(d)(2).

The issue of vendor discounts to political committees has been addressed by the Commission in a number of Advisory Opinions. In these AOs, the Commission has permitted a vendor to provide a discount to a political committee so long as the discount is made available in the ordinary course of business and on the same terms and conditions to other customers that are

³ The Times is a corporation organized under the laws of the State of New York.

⁴ A number of exemptions to this rule are set forth in 11 CFR Part 100, Subpart C, none of which are applicable here.

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1 not political committees or organizations. *See, e.g.*, AOs 2006-1 (PAC for a Change); 1995-46
2 (D'Amato); 1994-10 (Franklin National Bank).

3 Accordingly, this matter turns on whether the price paid for RGPC's advertisement fell
4 below The Times' usual and normal charge for that kind of advertisement. *See* 11 C.F.R.
5 § 100.52(d). The available information indicates that the appropriate charge turns on the
6 understanding between The Times and the Committee regarding the placement of its
7 advertisement. A large difference in price depends on whether the parties agreed that the
8 advertisement would run on a certain date, an "open" arrangement, or whether the advertisement
9 was not guaranteed to run on a particular day but would run at some point during the next week,
10 a "standby" arrangement.

11 In its response, The Times asserts that the RGPC advertisement was clearly and
12 consistently treated as a "standby" advertisement and was properly billed at the published
13 standby rate of \$64,575. The Times resp. at 1. The Times distinguishes the RGPC
14 advertisement from the MOPA advertisement, claiming that the former was "discussed, accepted
15 and coded as a standby ad" and that the "RGPC was told and understood that, as a standby ad, it
16 might not run on the desired date" of September 14, 2007. *Id.*

17 According to The Times, when the RGPC submitted its advertisement to The Times, the
18 advertising salesperson wrote "standby" on it and sent it to the standby team in The Times'
19 advertising department. The Times resp. at 3. Consistent with The Times' usual procedures for
20 a standby advertisement, the advertising salesperson indicated that the RGPC desired the
21 advertisement to run on Friday, September 14, 2007, and the employees in the advertising
22 production department said that they would do the best they could. *Id.* The Times asserts that no

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1 guarantees were ever made to RGPC that the advertisement would run on Friday, September 14,
2 and, indeed, it was not until late in the afternoon on Thursday, September 13, when The Times'
3 pagination requirements for Friday's paper became known, that The Times determined that the
4 advertisement would run on Friday as RGPC desired. *Id.* The Times asserts that all of this is
5 totally routine and in line with The Times' standard procedures for standby advertisements. *Id.*
6 at 3-4.

7 RGPC echoes The Times' response in asserting that RGPC paid the appropriate \$64,575
8 standby rate for its advertisement that had no guarantee of being run on any particular day.
9 RGPC resp. at 1. RGPC provides a sworn affidavit from Patricia W. Heck, president of
10 Crossroads Media LLC, who is "responsible for overseeing all media placements for the Rudy
11 Giuliani Presidential Committee, Inc." and has "specific knowledge of the actions undertaken by
12 RGPC with respect to the advertisement at issue." *Id.* at Exh. B, Heck Aff. at ¶ 1. Ms. Heck
13 avers that she requested the \$64,575 standby rate for RGPC's advertisement to run on September
14 14, 2007, even telling The Times' advertising representative that RGPC did not want to run the
15 advertisement unless it would run on September 14. *Id.* at ¶¶ 2, 4. The Times' advertising
16 representative, however, informed Heck that The Times could not guarantee that date. *Id.*
17 at ¶¶ 3, 6.

18 RGPC distinguishes the circumstances of its advertisement from those of MOPA's,
19 asserting that while the latter's had to run on Monday, September 10, 2007, the day of General
20 Petraeus' scheduled testimony before Congress, RGPC's own advertisement had no such
21 constraint: the events it referred to had already taken place and it spoke generally about General

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1 Petraeus' qualifications and thus the advertisement could have run on any day of the seven-day
2 standby window and would have remained meaningful. RGPC resp. at 2-3.

3 Despite The Times' assertion that at the standby rate of \$64,575 it could not guarantee
4 that RGPC's advertisement would run on the desired date of September 14, 2007, the
5 advertisement in fact ran on that date. As such, RGPC effectively received the benefits of the
6 open arrangement at the standby price, a fact acknowledged by The Times in its response: "In
7 the end, the RGPC got the same results as MoveOn, publication on the desired date at a \$64,575
8 price. However, they came about somewhat differently, the RGPC via published standby rates
9 and terms, and MoveOn with a reserved date but at a negotiated rate...." The Times resp. at 4,
10 fn 1. Further, although RGPC argues that its advertisement did not have the same timing
11 constraints as did the MOPA advertisement, the significance of RGPC's advertisement running
12 on September 14 was underscored by Rudy Giuliani himself, who stated on a radio show on
13 September 13 that "[w]e wanted tomorrow morning, because it's the day after the President's
14 speech."⁵ See [http://hughhewitt.townhall.com/talkradio/transcripts/page 6](http://hughhewitt.townhall.com/talkradio/transcripts/page%206). These circumstances
15 raise the question whether the RGPC advertisement was in fact subject to a standby arrangement.

16 The weight of the available information, however, cuts against a finding of reason to
17 believe in this matter. In response to the general allegation in the complaint that RGPC should
18 pay the same higher rate as MOPA, The Times and RGPC each provide specific accounts of an
19 arrangement emphasized as standby. RGPC has provided a sworn statement on the part of its
20 media vendor that The Times repeatedly told RGPC that for the \$64,575 standby rate, the

⁵ President Bush addressed the nation on the evening of September 13, 2007. See Address by the President to the Nation on the Way Forward in Iraq, at www.whitehouse.gov/news/releases/2007/09/20070913-2.html.

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1 newspaper could not guarantee that the committee's advertisement would run on the desired day.
2 Further, a standby arrangement by its very nature leaves open the possibility of the advertisement
3 running on the first of several possible dates, as occurred here. In addition, RGPC's payment of
4 \$64,575 on September 14, 2007, appears to have been timely.⁶

5 In sum, based on the available information, it does not appear that The Times made, or
6 that RGPC knowingly received, a corporate contribution in the form of reduced advertising costs.
7 Accordingly, we recommend that the Commission find no reason to believe that The New York
8 Times Company or Rudy Giuliani Presidential Committee, Inc. and John H. Gross, in his official
9 capacity as treasurer, violated 2 U.S.C. § 441b(a), and close the file in this matter.

10 **III. RECOMMENDATIONS**

- 11 1. Find no reason to believe that The New York Times Company violated 2 U.S.C.
12 § 441b(a).
13
14 2. Find no reason to believe that Rudy Giuliani Presidential Committee, Inc. and
15 John H. Gross, in his official capacity as treasurer, violated 2 U.S.C. § 441b(a).
16
17 3. Approve the attached Factual and Legal Analyses.
18
19 4. Close the file.

⁶ On its 2007 October Quarterly Report, RGPC disclosed a \$64,600 payment to Crossroads Media LLC on September 14, 2007 for "media," presumably corresponding to its advertisement that day in The Times. RGPC's media vendor avers that RGPC cut a check for the advertisement and sent it via FedEx on September 13, 2007. RGPC resp. at Exh. B, Heck Aff. at ¶ 8. This payment before the publication of the advertisement appears to be consistent with The Times' credit and payment terms, which state in part:

Advertisements must be paid for prior to publication deadline unless credit has been established by the advertiser and/or agency with The Times.

...

Advertisers and agencies granted credit will be billed weekly or monthly for published advertisements, as is determined by the category of advertising and established credit terms. Payment is due 15 days after the invoice date.

5. Approve the appropriate letters.

Thomasenia P. Duncan
General Counsel

3-23-09
Date

BY: Kathleen M. Guith
Kathleen M. Guith
Deputy Associate General Counsel
for Enforcement

Mark Allen
Mark Allen
Assistant General Counsel

Attachments:

1. Rudy Giuliani Presidential Committee advertisement
2. Clark Hoyt, *Betraying Its Own Best Interests*, THE NEW YORK TIMES, September 23, 2007

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"The willing suspension of disbelief."

- Hillary Clinton, 9/11/07

**The Democrats' Orchestrated
Attacks on General Petraeus...**

■ **Monday, September 10, 2007**

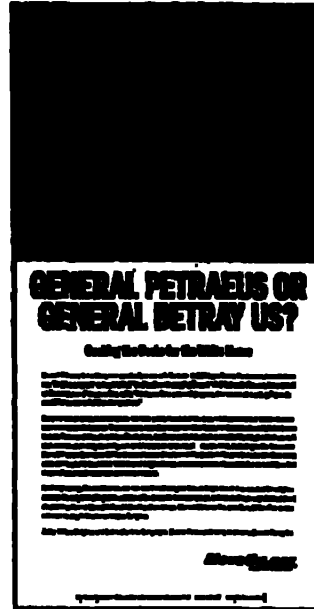
MoveOn.org calls General David Petraeus
"General Betray Us" in a New York Times
full page ad.

■ **Tuesday, September 11, 2007**

Hillary Clinton continued the character
attack on General Petraeus and refused
to denounce MoveOn.org's ad.

**"Using blunter language than any other Democrat
in the last two days, Mrs. Clinton told General
Petraeus that his progress report on Iraq required
'the willing suspension of disbelief.'"**

- New York Sun, 9/12/07



THE PETRAEUS RECORD...

★ **Four-Star General,
United States Army**

★ **Recognized in 2005 by U.S.
News and World Report as one
of America's 25 Best Leaders**

★ **The Defense Distinguished
Service Medal**

★ **Two awards of the Defense
Superior Service Medal**

★ **Four awards of the
Legion of Merit**

★ **The Bronze Star Medal
for Valor**

Who should America listen to...

**A decorated soldier's commitment to defending America,
or Hillary Clinton's commitment to defending MoveOn.org?**

**"These times call for statesmanship,
not politicians spewing political venom."**

- Mayor Rudy Giuliani

JoinRudy2008.com

Paid for by the Rudy Giuliani Presidential Committee, Inc. www.JoinRudy2008.com

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September 23, 2007

THE PUBLIC EDITOR; Betraying Its Own Best Interests

By CLARK HOYT

FOR nearly two weeks, The New York Times has been defending a political advertisement that critics say was an unfair shot at the American commander in Iraq.

But I think the ad violated The Times's own written standards, and the paper now says that the advertiser got a price break it was not entitled to.

On Monday, Sept. 10, the day that Gen. David H. Petraeus came before Congress to warn against a rapid withdrawal of troops, The Times carried a full-page ad attacking his truthfulness.

Under the provocative headline "General Petraeus or General Betray Us?" the ad, purchased by the liberal activist group MoveOn.org, charged that the highly decorated Petraeus was "constantly at war with the facts" in giving upbeat assessments of progress and refusing to acknowledge that Iraq is "mired in an unwinnable religious civil war."

"Today, before Congress and before the American people, General Petraeus is likely to become General Betray Us," MoveOn.org declared.

The ad infuriated conservatives, dismayed many Democrats and ignited charges that the liberal Times aided its friends at MoveOn.org with a steep discount in the price paid to publish its message, which might amount to an illegal contribution to a political action committee. In more than 4,000 e-mail messages, people around the country raged at The Times with words like "despicable," "disgrace" and "treason."

President George W. Bush called the ad "disgusting." The Senate, controlled by Democrats, voted overwhelmingly to condemn the ad.

Vice President Dick Cheney said the charges in the ad, "provided at subsidized rates in The New York Times" were "an outrage." Thomas Davis III, a Republican congressman from Virginia, demanded a House investigation. The American Conservative Union filed a formal complaint with the Federal Election Commission against MoveOn.org and The New York Times Company. FreedomsWatch.org, a group recently formed to support the war, asked me to investigate because it said it wasn't offered the same terms for a response ad that MoveOn.org got.

Did MoveOn.org get favored treatment from The Times? And was the ad outside the bounds of acceptable political discourse?

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The answer to the first question is that MoveOn.org paid what is known in the newspaper industry as a standby rate of \$64,575 that it should not have received under Times policies. The group should have paid \$142,083. The Times had maintained for a week that the standby rate was appropriate, but a company spokeswoman told me late Thursday afternoon that an advertising sales representative made a mistake.

The answer to the second question is that the ad appears to fly in the face of an internal advertising acceptability manual that says, "We do not accept opinion advertisements that are attacks of a personal nature." Steph Jespersen, the executive who approved the ad, said that, while it was "rough," he regarded it as a comment on a public official's management of his office and therefore acceptable speech for The Times to print.

By the end of last week the ad appeared to have backfired on both MoveOn.org and fellow opponents of the war in Iraq — and on The Times. It gave the Bush administration and its allies an opportunity to change the subject from questions about an unpopular war to defense of a respected general with nine rows of ribbons on his chest, including a Bronze Star with a V for valor. And it gave fresh ammunition to a cottage industry that loves to bash The Times as a bastion of the "liberal media."

How did this happen?

Eli Pariser, the executive director of MoveOn.org, told me that his group called The Times on the Friday before Petraeus's appearance on Capitol Hill and asked for a rush ad in Monday's paper. He said The Times called back and "told us there was room Monday, and it would cost \$65,000." Pariser said there was no discussion about a standby rate. "We paid this rate before, so we recognized it," he said. Advertisers who get standby rates aren't guaranteed what day their ad will appear, only that it will be in the paper within seven days.

Catherine Mathis, vice president of corporate communications for The Times, said, "We made a mistake." She said the advertising representative failed to make it clear that for that rate The Times could not guarantee the Monday placement but left MoveOn.org with the understanding that the ad would run then. She added, "That was contrary to our policies."

Arthur Sulzberger Jr., the publisher of The Times and chairman of its parent company, declined to name the salesperson or to say whether disciplinary action would be taken.

Jespersen, director of advertising acceptability, reviewed the ad and approved it. He said the question mark after the headline figured in his decision.

The Times bends over backward to accommodate advocacy ads, including ads from groups with which the newspaper disagrees editorially. Jespersen has rejected an ad from the National Right to Life Committee, not, he said, because of its message but because it pictured aborted fetuses. He also rejected an ad from MoveOn.org that contained a doctored photograph of Cheney. The photo was replaced, and the ad ran.

Sulzberger, who said he wasn't aware of MoveOn.org's latest ad until it appeared in the paper, said: "If we're going to err, it's better to err on the side of more political dialogue. ... Perhaps we did err in this case. If we did, we erred with the intent of giving greater voice to people."

For me, two values collided here: the right of free speech — even if it's abusive speech — and a strong personal revulsion toward the name-calling and personal attacks that now pass for political dialogue, obscuring rather than illuminating important policy issues. For The Times, there is another value: the protection of its brand as a newspaper that sets a high standard for civility. Were I in Jespersen's shoes, I'd have demanded changes to eliminate "Betray Us," a particularly low blow when aimed at a soldier.

In the fallout from the ad, Rudolph Giuliani, the former New York mayor and a Republican presidential candidate, demanded space in the following Friday's Times to answer MoveOn.org. He got it — and at the same \$64,575 rate that MoveOn.org paid.

Bradley A. Blakeman, former deputy assistant to President Bush for appointments and scheduling and the head of FreedomsWatch.org, said his group wanted to run its own reply ad last Monday and was quoted the \$64,575 rate on a standby basis. The ad wasn't placed, he said, because the newspaper wouldn't guarantee him the day or a position in the first section. Sulzberger said all advocacy ads normally run in the first section.

Mathis said that since the controversy began, the newspaper's advertising staff has been told it must adhere consistently to its pricing policies.